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Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, AND COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the conceded waiver of sovereign immunity by the United States in intervening and asserting water rights claims for certain Indian reservations in *Arizona v. California* (1963) 373 U.S. 546 (*Arizona I*) extends to an ancillary action in a District Court to determine the disputed boundaries underlying those same claims as mandated in *Arizona v. California* (1983) 460 U.S. 605 (*Arizona II*).

(2) Whether the Quiet Title Act applies to an action for judicial review of decisions by the Secretary of the Interior redefining and enlarging the boundaries of three Indian reservations where the action (a) seeks a determination of the boundaries solely to measure the implied water rights for the reservations and (b) does not seek to divest the United States of title to any lands.

(3) If the Quiet Title Act is applicable, does its exception for "trust or restricted Indian lands" bar judicial review where the United States has made no showing that the disputed areas are such lands other than to rely on the three disputed *ex parte* Secretarial orders at issue, two of which (Fort Mojave and Colorado River) were based on interpretations rejected by the Special Master in *Arizona I* and the third (Fort Yuma) overturned three prior departmental decisions to the contrary.

(4) Whether the boundary disputes present a "case or controversy".

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners the State of California, the State of Arizona, The Metropolitan Water District of Southern California and Coachella Valley Water District, the latter two petitioners being public agencies of the State of California.

Respondents the United States of America, Donald P. Hodel, Secretary of the Interior, Quechan Indian Tribe, Fort Mojave Indian Tribe and Colorado River Indian Tribes.

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THE STATE OF CALIFORNIA, THE STATE OF ARIZONA,
THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA,
and COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners the State of California, *et al*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the proceedings below on October 14, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *Metropolitan Water District of Southern California v. U.S.* at 830 F.2d 139 and is reprinted in the appendix hereto, p. 1a *infra*.

The memorandum decision of the United States District Court for the Southern District of California (Brewster, D.J.) is reported as *Metropolitan Water District of Southern California v. U.S.* at 628 F.Supp. 1018 (1986) and is reprinted in the appendix hereto, p. 12a *infra*.

JURISDICTION

Invoking federal jurisdiction under 5 U.S.C. §702, petitioners The Metropolitan Water District of Southern California (hereafter "Metropolitan") and Coachella Valley Water District (hereafter "Coachella") brought this suit in the Southern District of California against respondents the United States of America and the Secretary of the Interior. The respondent tribes intervened as defendants and the States of California and Arizona were later joined as defendants. On February 25, 1986, the District Court denied respondents' motions for summary judgment, granted petitioners' cross-motion for summary judgment in part, declared the Secretary's 1974 order redetermining the boundary of the Fort Mojave Indian Reservation invalid, and set the boundary issue for trial. Respondents obtained an order granting an interlocutory appeal on the merits of the District Court order. However, on that appeal respondents also raised the claim that the District Court lacked jurisdiction because the United States had not waived its sovereign immunity and petitioners Metropolitan and Coachella lacked standing to bring the action, defenses which had been intentionally waived in the District Court.

On respondents' appeals the Ninth Circuit on October 14, 1987, entered a judgment and an opinion remanding to the Southern District and directing that the complaint be dismissed for lack of jurisdiction. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

(1) 5 U.S.C. §702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(2) Quiet Title Act, 28 U.S.C. §2409a

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall

determine to be just compensation for such possession or control.

(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

* * *

(3) McCarran Amendment, 43 U.S.C. §666

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

* * *

(4) 43 U.S.C. §772

The Secretary of the Interior may, as of March 3, 1909, in his discretion, cause to be made, as he may deem wise under the rectangular system on that date provided by law, such surveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

STATEMENT OF THE CASE

This case arises out of the historic water rights adjudication by this Court in *Arizona v. California* (1963) 373 U.S. 546 (hereafter *Arizona I*) and its aftermath, *Arizona*

v. California (1983) 460 U.S. 605 (hereafter *Arizona II*). It involves the attempt by petitioners to obtain a determination of several Indian reservation boundary disputes left unresolved in this Court's 1963 decision in *Arizona I* so that the reservations' water rights may be finally established in order to facilitate necessary water planning in California and Arizona. This Court in *Arizona II* directed the States of California and Arizona to intervene in an action brought by Metropolitan and Coachella in the U.S. District Court for the Southern District of California to determine those boundaries. The States were added as parties and have fully participated in the proceedings below. The amount of water at issue is about 104,000 acre-feet of diversions in California, which is enough water to supply about 500,000 people annually in Metropolitan's service area.

Metropolitan imports water to the Southern California coastal plain and wholesales that water to its twenty-seven member public agencies in an area stretching from Ventura to the Mexican border and encompassing over one-half the population of the state. A major portion of Metropolitan's water is obtained from the Colorado River pursuant to contracts with the Secretary of the Interior for the storage and delivery of Colorado River water pursuant to the Boulder Canyon Project Act (43 U.S.C. § 617 *et seq*).

In *Arizona I* California's share of the 7.5 million acre-feet of Colorado River water which was allocated to Arizona, Nevada, and California by the Secretary pursuant to the Boulder Canyon Project Act was limited to 4.4 million acre-feet a year, plus one-half of any surplus. In addition, five Indian reservations along the lower Colorado River were awarded "implied" water rights based upon the *Winters* doctrine, *i.e.*, enough water to satisfy the "reasonable needs" of the reservations. *Winters v. U.S.* (1908) 207 U.S. 564. The "reasonable needs" of the Indians were measured by the amount of "practicably irrigable

acreage" on each reservation multiplied by a unit diversion duty for such acreage. *Arizona I* at 600-01. The reservations' priority dates are their dates of creation or the dates of any subsequent additions. Each reservation was created long before Metropolitan's water contracts with the Secretary.

An issue was raised by California as to whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and Fort Mojave Reservations were actually within their boundaries.[1] The issues were tried before Special Master Simon H. Rifkind, who largely rejected the United States' claims, adopted the California positions, and recommended water allocations for those reservations based upon his boundary determinations.[2] This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes here." *Id.* at 601.

The Court's 1964 Decree (376 U.S. 340, 345) nevertheless awarded water rights to the two reservations based upon the Special Master's boundary determinations,

[1] No dispute was raised as to the boundary of the Fort Yuma (Quechan) Reservation since the United States' claim was consistent with long-standing Departmental interpretation of that boundary, which is contrary to the later 1978 Secretarial order challenged below.

[2] The decree in *Arizona I* awarded the five mainstream reservations 905,498 acre-feet of diversions for 135,636 acres of irrigable land (376 U.S. 340, 344-45), even though the maximum annual irrigated acreage on those reservations never exceeded 36,000 acres. California Proposed Findings and Conclusions before Special Master Simon H. Rifkind (April 1, 1959) Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104 and 18F:104.

Special Master Rifkind recommended "practicably irrigable acreage" as the measure of the reserved water rights because, *inter alia*, it would "provide certainty for both the United States and non-Indian users." Report of Special Master Simon H. Rifkind (December 5, 1960) at 265. That objective has been frustrated by the three unresolved reservation boundary disputes which are the subject of this action.

"... subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." The quantities awarded are charged to the allocation of the state in which the reservation is located. Because of Metropolitan's junior priority, all parties concede that any additional water rights for the reservations in California will necessarily reduce Metropolitan's supply during any year when California's entitlement is restricted to 4.4 million acre-feet. That limitation is no more than several years away now that the Central Arizona Project is on line.

The three Secretarial Orders which are the subject of the litigation below were issued in 1969, 1974 and 1978. There is no dispute that the proper location of the reservation boundaries is the essential first step in establishing the measure of any implied water rights to which these reservations may be entitled under *Arizona I*. It is also not disputed that the Secretary's Fort Mojave and Colorado River reservation boundary orders were based on the same interpretations which California had successfully resisted in the trial before Special Master Rifkind. Nevertheless, each of the orders was entered without affording Metropolitan or any other affected water users notice or opportunity to be heard and purports to redetermine the boundaries *retroactive* to the date of their creation. The undisputed result is to give each reservation additional acres upon which to base a claim for additional water rights with an earlier priority than Metropolitan's.

The culmination of the Secretary's *ex parte* boundary determinations was the United States' petition filed in December 1978 to reopen *Arizona I* and, *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within the added areas. The Special Master appointed to hear those claims refused to consider the merits of the Secretary's *ex parte* orders, accepting the United States' argument that they constituted "final determinations" of the boundaries. *Arizona II*

at 634-35. Over the objections of Metropolitan and the other "State Parties" he conducted a trial solely on the issue of the irrigability of the added lands and recommended an award to the three tribes of an additional 104,000 acre-feet annually. Faced with the denial of their day in court, Metropolitan and Coachella sought review of the Secretarial boundary orders in the United States District Court for the Southern District of California. The State Parties' subsequent opposition to Special Master Tuttle's report in *Arizona II* made clear the limited purpose of that suit and that it in no way sought to "quiet title" to the lands involved in the water agencies or to otherwise divest the United States of title. For example, in oral argument Justice O'Connor posed the following question to counsel for Metropolitan:

> QUESTION: The states don't claim any interest in the land itself. You are concerned only with the water rights attached to it which might change because of the boundary change. Is that right?
> MR. BORONKAY: That is correct. . . .

Transcript of Oral Argument, *Arizona II* (December 8, 1982) at 14-15 (hereafter "Oral Argument").

It was against that background that the Court, after describing the State Parties' efforts to obtain a resolution of the boundary disputes as being "only for the limited purpose of establishing additional Indian water rights, if any" (*Arizona II* at 634), rejected Special Master Tuttle's recommendations and directed the District Court to resolve the boundary disputes:

> . . . we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies or private water users holding priority rights.

* * *

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and are not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

Arizona II at 636, 638 (footnotes omitted).

Moreover, the Court's reference to the defenses raised by the United States to the District Court action, including sovereign immunity, was made after the Deputy Solicitor General had "disowned" those defenses in oral argument.[3]

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[3] QUESTION: Well, Mr. Claiborne, what is your—the United States' position in these other forums? Are you taking the position that the Secretary's proceedings are open to review, or are you moving to dismiss for want of jurisdiction, or on sovereign immunity grounds?
MR. CLAIBORNE: Justice White, as was correctly stated, I think, by Mr. Boronkay, the United States has in the proceeding filed in the Southern District of California submitted a motion to dismiss alleging—

QUESTION: So you are saying—your position is that these determinations are not subject to review anywhere, here or in another forum.
MR. CLAIBORNE: I hope I do not have to—I disown the motion to

The United States subsequently amended its motion to dismiss in the District Court action to delete them, with the following explanation:

> Upon consideration of the issues involved, the defendants believe it appropriate to withdraw most of the objections raised in their earlier motion to dismiss. *Where the action merely questions the accuracy of the determination of reservation boundaries, and the legal title to the lands is not at issue, we think the action may go forward pursuant to the Administrative Procedure Act.*

U.S. Memorandum in Support of Motion to File Amended Motion to Dismiss at 3 (June 17, 1983) (emphasis added).

After the parties agreed to address the boundary disputes individually, cross motions for summary judgment on the Fort Mojave dispute were filed. Following extensive briefing and three days of oral argument the District Court voided the Secretary's Fort Mojave order on the basis that (1) the Secretary could not exercise his authority to correct allegedly erroneous surveys under 43 U.S.C. § 772 in a manner that would impair Metropolitan's water rights because Metropolitan was a "claimant" protected by the proviso to that statute and (2) in any event, Metropolitan's water supply contracts entitled it to procedural due-process protection, which it had been denied. The District Court also held that a *de novo* trial as to the proper boundary was appropriate under *Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402 because (1) the Secretary's 1974 order constituted a partial "adjudication" of Metropolitan's water rights and (2) the Secretary's fact-finding procedures were grossly inadequate because Metropolitan had not been given any notice of the Secretary's *ex parte* procedure nor any opportunity to be heard.

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dismiss which has been filed by the United States in the district court . . . Oral Argument at 61-62.

Upon respondents' motions and District Court certification, the Court of Appeals granted an interlocutory appeal under 28 U.S.C. § 1292(b). At this point respondents decided that they did not want the District Court to decide the merits of the boundary issues and resurrected the sovereign immunity and standing defenses earlier abandoned.[4] The Court of Appeals accepted the sovereign immunity argument and ordered the District Court to dismiss the case for lack of jurisdiction. It also suggested that Metropolitan's action "presents the additional jurisdictional problem of absence of a case or controversy."[5] It did not address the merits of the District Court's decision.

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[4] *See p. 10 supra*. The Tribes had earlier asserted that: "Following the Supreme Court's 1983 decision in *Arizona v. California*, the conclusion that MWD's interests merit judicial review of the Secretary's decisions is not subject to question. . . . [and] the parties intend this litigation to constitute the necessary review." Memorandum of the Fort Mojave Indian Tribe, The Quechan Tribe and the Colorado Indian Tribes in Support of Their Motion to Certify Issues for Interlocutory Appeal at 20-21, notes 7 and 8 (March 25, 1986).

[5] App. at 6a. After a highly questionable analysis of why the action may have presented a justiciable controversy before, but not after this Court's decision in *Arizona II*, the court found it unnecessary to decide the question. However, the tenor of its discussion makes it clear that it has reached a conclusion on this issue. Consequently, if this petition is granted this Court should also decide that issue. Otherwise, if the Ninth Circuit's sovereign immunity decision is overturned it is clear to petitioners that the Ninth Circuit will simply dismiss for lack of a case or controversy. Therefore a decision by this Court on that issue is necessary to prevent even further delay of the resolution of the boundary controversies, especially since the Secretary is already delivering substantial quantities of water to the Fort Mojave Tribe for use on the disputed area in violation of the decree in *Arizona I*.

After having conceded in the District Court that Metropolitan is "a party aggrieved by the Secretary's action and that they have standing under the APA" (Tr. of proceedings of December 10, 1984 at 104) the United States argued on appeal that Metropolitan was not an "aggrieved" party inasmuch as the Secretary's 1974 order "has caused no actual or threatened injury to Metropolitan." U.S. Br. at 32. Although it is true that the Secretary's boundary decisions *per se* have not yet

The Ninth Circuit's decision was based on several crucial premises, all faulty: (1) the waiver of sovereign immunity by the United States in asserting water rights claims for the three reservations in *Arizona v. California* does not extend to the litigation of the boundary components of those same claims in the ancillary proceeding before the District Court; (2) the waiver of sovereign immunity in the Administrative Procedure Act (5 U.S.C. §702) is not applicable because the Quiet Title Act (QTA) is a "statute that grants consent to suit [and] expressly or impliedly forbids the relief which is sought" because it bars actions to quiet title to "trust or restricted Indian lands" and "the effect of a successful challenge [by petitioners] would be to quiet title in others than the Tribe" (App. at 9a);[6]

caused an actual reduction in Metropolitan's supply under its water delivery contracts, that result is inevitable if these decisions are sustained. Thus they certainly present the kind of "threatened injury" which is adequate to sustain jurisdiction under this Court's recent standing decisions abandoning any rigid requirement of "certainty" of injury to a more liberal "probability" of injury. Davis, 4 *Admin. Law Treatise* (1983) §24.12; *Bryant v. Yellen* (1980) 447 U.S. 352. Similarly, the Secretarial orders are "ripe" for review even though they have not yet been applied to actually reduce Metropolitan's Colorado River water rights. *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136; Davis, 4 *Admin. Law Treatise* (1983) §§ 25.6-25.10. In any event, petitioners believe that this Court's directive in *Arizona II* that the District Court hear the boundary disputes is dispositive of this issue.

[6] The court did not address the Tribes' contention that Metropolitan's suit was barred by the QTA's 12 year statute of limitations because Metropolitan knew of the United States' boundary claims since the original litigation of those disputes in the 1950's in *Arizona I*. This would put petitioners in the position of having prevailed in *Arizona I* with regard to the Fort Mojave and Colorado River Reservation boundary issues, but yet being required to commence a separate action to relitigate the same issues, a procedure totally at odds with this Court's conclusion in *Arizona II* that the United States had that burden. *Arizona II* at 637.

Even if the QTA were applicable to Metropolitan's action, its limitation period should be tolled while the issue was in contention before this Court in the sequential stages of *Arizona v. California* resulting

and (3) the action is not basically a water rights suit and, in any event, the QTA's preservation of the McCarran Amendment's waiver of sovereign immunity for water rights adjudications involving the United States is not applicable because petitioners do not seek a "general stream adjudication".

REASONS FOR GRANTING THE WRIT

In *Arizona II* this Court made it clear that it did not look with favor on the United States' failure to obtain a judicial determination in another forum of the Fort Mojave and Colorado River reservation boundary issues which it had presented in *Arizona I* but which were not decided in 1963. Moreover, the Court's discussion of its conclusion that the District Court appeared to be a "suitable and appropriate" forum to resolve the three boundary disputes made it clear that it did not favorably view the jurisdictional defenses which had been raised by the United States in the District Court. Nevertheless, after having formally abandoned those defenses before the District Court, the United States successfully resurrected its sovereign immunity and standing defenses on its interlocutory appeal from the District Court's order invalidating the Secretary's 1974 Fort Mojave boundary order. The Ninth Circuit's decision:

(1) frustrates the long overdue resolution of the only remaining unadjudicated water rights on the lower Colorado River in a timely fashion and leaves necessary water planning in California and Arizona in limbo;

(2) raises important questions about the scope of the United States' waiver of sovereign immunity when it asserts claims by direct action or intervention, particularly in the original jurisdiction of this Court;

in the decision in *Arizona II*. See *Burnett v. New York Central R.R.* (1965) 380 U.S. 424. For the reasons detailed in note 5 *supra*, this issue should also be decided if this petition is granted.

(3) negates the salutary broad waiver of sovereign immunity in the Administrative Procedure Act by a tortured reading of the scope of the Quiet Title Act which is in conflict with the QTA's plain language and this Court's interpretation of its purpose;

(4) applies the "trust or restricted Indian lands" exemption in the QTA in a fashion in conflict with the Eighth Circuit's interpretation; and

(5) presents an important question concerning the relationship of the QTA to Indian water rights adjudications and the Secretary's authority to resurvey public and Indian lands.

Petitioners seek review and summary reversal of the Ninth Circuit's decision by this Court. If the Ninth Circuit's decision is let stand, petitioners will have no avenue for relief other than to petition this Court to reopen the decree in *Arizona v. California* and decide the disputes. *See Arizona II* at 638.

I. The Ninth Circuit's decision unreasonably limits the conceded waiver of sovereign immunity resulting from the United States' assertion of Indian water rights in *Arizona I* and restricts this Court's ability to utilize district courts to decide issues presented by the United States in original actions.

(a) The United States has waived sovereign immunity as to the reservation boundary disputes.

There is no dispute that the United States' intervention in *Arizona I* and its assertion of *Winters* rights for the Fort Mojave and other Indian reservations waived its sovereign immunity to the extent necessary to adjudicate those claims.[7] Petitioners contend that such waiver extends to

[7] *Arizona I* at 551. Justice White put the issue succinctly to counsel for the United States during oral argument in *Arizona II*:
QUESTION: But the United States is in this Court litigating . . . so it is subject to . . . having its case decided here. You can't get out of this case with a sovereign immunity claim.
MR. CLAIBORNE: I appreciate that . . . .
Oral Argument at 62.

ancillary proceedings, such as the District Court litigation below, in which essential elements of those same federal claims are presented. The issue appears to be one of first impression. However, this Court long ago held, in a classic opinion by Justice Holmes, that "when the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter*." *Luckenbach S.S. Co., Inc. v. The Thekla* (1924) 266 U.S. 328, 339-40 (emphasis added). The Fifth and Tenth Circuits have held that neither independent actions nor claims in intervention against the United States with respect to the same subject matter in the same district court are barred by sovereign immunity.[8] Although petitioners have found no case squarely holding that the waiver of sovereign immunity which results from the United States' assertion of a claim in one forum extends to a separate suit in another forum on the same subject matter seeking resolution of an issue necessarily presented by the United States' claim, petitioners believe that such a result may reasonably be implied from *The Thekla*, *supra*, and *Minnesota v. U.S.* (1939) 305 U.S. 382, 389 (district court jurisdiction on removal derives from state court jurisdiction). Just as this Court made clear in rejecting Arizona's contention that its sovereign immunity barred intervention by the Tribes in *Arizona II*[9], the United States' sovereign immunity is not

[8] *Jones v. Watts* (5th Cir. 1944) 142 F.2d 575; *U.S. v. Martin* (10th Cir. 1959) 267 F.2d 764, 769-70 (water rights claims); *U.S. v. Taunah* (10th Cir. 1984) 730 F.2d 1360 (Indian land dispute).

[9] The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by

compromised by requiring it to litigate in the District Court the identical claims it presented and litigated (unsuccessfully) before this Court in *Arizona I*, but which the Court left open for future resolution elsewhere. Petitioners seek no affirmative relief of any kind against the United States, *e.g.*, damages for delivering water to the disputed areas in violation of the decree in *Arizona I*. Like a permissible counterclaim, the issue which petitioners seek to have resolved "arises out of the same transaction or occurrence as the main suit and the relief sought neither exceeds nor is different in kind from that demanded by the Sovereign". *U.S. v. Penn* (D. V.I. 1986) 632 F.Supp. 691, 693. Consequently, as Justice Holmes concluded in *The Thekla*, "the reasons are strong for not obstructing the application of natural justice against the Government by technical formulations when justice can be done without endangering any public interest . . . [The Government] joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act." 266 U.S. at 341.

The Ninth Circuit did not reject petitioners' claim that the waiver of sovereign immunity resulting from the United States' intervention in *Arizona I* extends to the subject matter of its claims without limitation as to forum.[10] Rather, the Ninth Circuit concluded that "an application to the Supreme Court under a continuing decree for a

granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Arizona II at 614.

[10] The United States argued that the earlier Ninth Circuit decision in *Fidelity & Casualty Co. v. Reserve Ins. Co.* (9th Cir. 1979) 596 F.2d 914 was adverse to petitioners' argument. That case is clearly distinguishable, however, because petitioners, unlike the plaintiff insurance company in *Fidelity*, did participate in *Arizona I and II* and this Court concluded in *Arizona II* that the District Court suit was necessary to

reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries". App. at 8a. That analysis is plainly in error and evidences a lack of understanding of the critical relevance of a Secretarial boundary determination to the magnitude of a *Winters* water right. The United States told this Court in *Arizona I* that "the determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation" and, as this Court later noted, "all of the parties treated the boundary matters as fully adjudicable issues of material fact or law." *Arizona II* at 637.

The United States should not be permitted to abuse the original jurisdiction of this Court by asserting water rights for Indian reservations and then, having had its underlying boundary claims rejected, running for cover after it became clear that the District Court was not sympathetic to the Secretary's inequitable boundary determination procedures. The United States' blatant forum-shopping strategy should be rejected.

(b) The Ninth Circuit's decision frustrates this Court's directive in *Arizona II* that the boundary disputes be resolved by the District Court.

Petitioners believe that this Court's directions to the District Court in *Arizona II* clearly made those proceedings "ancillary" to the original proceedings in this Court, even if those directions may have fallen short of actually designating Judge Brewster a special master for the limited purpose of determining the boundaries (a course of action that petitioners believe remains open to the Court):

provide a resolution of the boundary claims presented by the United States in those original actions. In any event, *Fidelity* was not relied on by the Ninth Circuit.

> Hence, in our judgment, the litigation filed in the United States District Court for the Southern District of California should go forward, intervention motions, if any are to be made, should be promptly made, and the litigation expeditiously adjudicated. If there are issues in that action without substantial connection to the issues in this original action, they should be severed and adjudicated separately if their consideration would substantially delay the final resolution of the questions which have made it necessary to keep our decree in this action open to accommodate the results of unresolved issues.

Arizona II at 639 (emphasis added).

That directive followed rejection of the arguments of the States of Arizona and California that this Court should decide the boundary issues. Acknowledging that "the States have not yet sought to intervene in that litigation" (*id.* at 638), the Court directed that "intervention motions . . . should be promptly made" and "[i]f the States and/or the agencies wish to challenge the recently finalized administrative action regarding the 'Checkerboard area' . . . , they should amend their complaint and raise the issue in the District Court suit." *Id.* at 639. The Court was clearly shifting the arena for the necessary resolution of the boundary disputes from a traditional Court-appointed Special Master to the District Court. By that action petitioners believe that the Court did not intend to nullify the waiver of sovereign immunity with respect to those same claims which resulted when the United States initially presented them in *Arizona I*. Apart from the importance of this issue in the present Colorado River dispute, the Court may find it highly useful to utilize district courts to conduct proceedings ancillary to cases in its original jurisdiction and should take this opportunity to clarify the scope of its authority in this regard.

II. The Ninth Circuit's interpretation of the Quiet Title Act extends its applicability far beyond its plain language and conflicts with this Court's decisions as to its scope.

The QTA waives sovereign immunity for actions "to adjudicate a disputed title to real property in which the United States claims an interest . . . ." 28 U.S.C. §2409a(a). The plain language of the Act, reinforced by its legislative history, makes it clear that Congress intended the QTA to apply only to suits seeking to divest the United States of some or all of its interests in land.[11] Indeed, this Court in *Block v. North Dakota* (1983) 461 U.S. 273, 282, recognized that the Congressional hearings on the proposed legislation reflected the "predominant view . . . that citizens asserting title to or the right to possession of lands claimed by the United States were 'without benefit of a recourse to the courts', because of the doctrine of sovereign immunity" and that "Congress sought to rectify *this state of affairs*" in the QTA. (Emphasis added). Thus section 3(c) required that a party bringing a suit under the Act must "set forth with particularity the nature of the right, title or interest which [it] claims in the real property". 28 U.S.C. §2409a(c). Inasmuch as it is undisputed that petitioners have alleged no such claim to the lands in the disputed area, the QTA is plainly not applicable to this action. *See, e.g., Prater v. U.S.* (5th Cir. 1980)

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[11] That the "quiet title" claim which must be specifically alleged is one which would divest the United States of title is made abundantly clear by section 3(b), which provides that, in the event the adverse private claim is sustained, the United States may elect to retain the land and pay just compensation to the claimant. 28 U.S.C. §2409a(b). The hearings on the proposed legislation focused solely on the need to afford private land claimants access to the courts in order to "quiet title" to areas in which *ownership* was in dispute with the United States. *Hearings on S. 216 et al before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs*, 92d Cong., 1st Sess. *passim* (1971).

618 F.2d 263; *Kinscherff v. U.S.* (10th Cir. 1978) 586 F.2d 159; *City of Sault Ste. Marie, Michigan v. Andrus* (D.D.C. 1978) 458 F.Supp. 465. In *Landow v. Carmen* (D. Md. 1983) 555 F.Supp. 195, 197, the court observed that "although there are many reported cases on the Quiet Title Act, this Court is not aware of any case holding that a dispute about a non-ownership interest is sufficient to confer Quiet Title Act jurisdiction." Petitioners' research confirms that analysis.

In its brief on the merits before this Court in *Block*, the United States characterized North Dakota's suit as one "to wrest title" from the Federal Government (U.S. Br. at 11) and asserted that the QTA "established a uniform procedure for prosecuting claims to land to which the United States asserts title." *Id.* at 12. With regard to the applicability of 5 U.S.C. §702, the United States explained as follows:

> Of course, Section 702 allows challenges to the administration of federal lands on the ground that the actions complained of violate procedural or substantive restrictions imposed by applicable law. But the amendment to the APA was never conceived of as affording a vehicle for questioning the underlying title.

Id. at 23. Petitioners agree, and it is plain that the present boundary disputes fall into the former category, not the latter.

Consequently, it follows that the QTA's provision that it "does not apply to trust or restricted Indian lands" is similarly limited to claims that would divest the *United States* of title to such lands, since it is the fee owner of such lands. *Minnesota v. U.S.* (1939) 305 U.S. 382. These were the kinds of claims to Indian lands made in *U.S. v. Mottaz* (1986) 476 U.S. 834; *Spaeth v. U.S. Secretary of the Interior* (8th Cir. 1985) 757 F.2d 937; and *Florida Dep't of Business Regulations v. U.S. Dep't of Interior*

(11th Cir. 1985) 768 F.2d 1248, *cert. denied* (1986) 475 U.S. 1011. Although in the *Florida* case the State was not seeking to quiet title in itself, the Eleventh Circuit nevertheless found the QTA applicable because Florida sought an order invalidating the challenged transaction and "*divesting the United States of its title to land* held for the benefit of an Indian tribe". 768 F.2d at 1254 (emphasis added).

Petitioners argued below that the Indian lands exemption was not applicable because their claim would not divest the United States of title. In response, the Ninth Circuit broke new ground and concluded that the QTA applies where "the effect of a successful challenge [by petitioners] would be to quiet title in others than the Tribe". App. at 9a. The "others" can only be the United States, because there are no other claimants to the disputed area. That kind of result clearly is not barred by the QTA, since it simply affects the Secretary of the Interior's intramural management of the federal lands—it does not divest the United States of the legal title to the disputed area. As was cogently recognized in a similar boundary dispute in *Pueblo of Taos v. Andrus* (D.D.C. 1979) 475 F.Supp. 359, 365: "The relief requested in this case affects no ownership interest; it would merely adjust the boundaries between two parcels of government-owned land, one of which is held for the benefit of the Taos Pueblo."

The 10th Circuit has also correctly recognized that "adjudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands." *Navajo Tribe of Indians v. New Mexico* (10th Cir. 1987) 809 F.2d 1455, 1475. Indeed, this Court recognized in *Arizona II* that such a boundary dispute might involve either "land titles or political jurisdiction". *Arizona II* at 629. However, the Ninth Circuit's failure to recognize the distinction will frustrate resolution of important federal-state-Indian jurisdictional problems which flow from Secretarial orders affecting Indian reservation boundaries. Whether states have

civil jurisdiction over various activities on Indian reservations may often turn on the proper location of a reservation's boundary,[12] just as federal-state criminal jurisdiction turns on whether an area where a crime is committed is "Indian country" under 18 U.S.C. §1151. The boundary issues raised in the numerous "reservation disestablishment" cases, although not affecting land titles, are clearly "boundary disputes with the Government." Yet they are customarily presented and decided in habeas corpus proceedings, which no one has ever suggested are barred by the QTA. *See, e.g., Solem v. Bartlett* (1984) 465 U.S. 463. However, under the Ninth Circuit's assumption that "all boundary disputes with the government" are governed by the QTA[13] without regard to whether resolution of the boundary dispute would divest the United States of title, States would have no recourse to the courts under either the QTA or the APA to resolve critical jurisdictional disputes turning on Secretarial Indian boundary determinations. Congress obviously intended no such result in either act, and this Court should make that clear.

Beyond that error, the Court of Appeals further misconstrues the nature of the action below in asserting that "to allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them." App. at 10a. This is not so. Petitioners would not and probably could not challenge the policy decision of the Secretary to add the disputed public lands to the reservation as Indian trust lands (assuming that he possesses statutory authority to do so) or the obvious power of Congress to declare them trust lands. All that they challenge is the Secretary's attempt to give the added lands a *ret-*

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[12] *See, generally,* Cohen, *Handbook of Federal Indian Law* (1982) ch. 6, sec. C; *Ute Indian Tribe v. Utah* (10th Cir. 1985) 773 F.2d 1087, *cert. denied* (1986) ___ U.S. ___, 107 S.Ct. 596.

[13] *Fadem v. U.S.* (9th Cir. 1986) 791 F.2d 1381, 1383.

roactive earlier *water* priority by "reinterpreting" the controlling 1870 executive order rather than having Congress simply add the lands to the reservation, in which event they would have a water priority junior to Metropolitan's. *See Arizona II* at 641 (Cocopah Reservation).

Finally, the Ninth Circuit erroneously asserts that petitioners challenge "the fundamental authority of the Secretary to establish reservation boundaries and to protect the property interests of Indian tribes. This it cannot do." App. at 10a. Petitioners made no such challenges. First, the Secretary presently has no authority to "establish reservation boundaries." Only Congress can do that. What the Secretary does possess is the authority to interpret statutes and executive orders creating Indian reservations in order to segregate them from the public lands by survey. That conceded authority is not challenged, only the way that it was unlawfully implemented in the case of the Fort Mojave Reservation for the reasons explicated by the District Court. Again, the court in *Pueblo of Taos* applied the proper analysis: "The gravamen of this section, however, is not a challenge to the authority of the Attorney General to issue the opinion he did, but rather is a request seeking this Court's judicial interpretation of the same matter presented to the Attorney General". 475 F.Supp. at 364 (footnote omitted).

Second, petitioners do not challenge the basic authority of the Secretary "to protect the property interests of Indian tribes", but only his improper exercise of that authority in a manner that would unlawfully impair property rights under existing water delivery contracts. In either case, the objective of petitioners' challenge is by no stretch of the imagination to divest the United States of any of its ownership interests in the disputed area, whether public lands or lands held in trust for Indians, and it is only for such a title-divesting claim that the QTA is the exclusive remedy.

In summary, given the nature and background of petitioners' boundary claims and considering that *Block* followed closely on the heels of *Arizona II*, this Court plainly understood that the claims were not of the "title divesting" character encompassed by the QTA, or else the Court's direction that they be pursued in the District Court would have mandated an exercise in futility. This seems unlikely in light of the Court's urging of expeditious resolution of the boundary issues by the District Court, a goal that the Ninth Circuit seems to have gone out of its way to frustrate.

III. The Ninth Circuit's interpretation of the "trust or restricted Indian lands" exception in the Quiet Title Act conflicts with the Eighth Circuit's interpretation and would obliterate the protection afforded property claimants under 43 U.S.C. §772.

Even assuming that the Ninth Circuit's conclusion that the QTA covers suits to "divest" tribes of their claimed beneficial interest in "trust or restricted Indian lands" was correct, whether or not the disputed lands qualify as such lands must still be determined. The Ninth Circuit concludes that the United States' mere pleading that the Secretary has determined such status is enough, thus in effect validating the very Secretarial order under attack. The United States was unsuccessful in a similar ploy to avoid the QTA sovereign immunity waiver before the Eighth Circuit, which held that the United States' bare *ipse dixit* before the district court that certain lands are "trust or restricted Indian lands" is not sufficient to invoke that exception to the QTA. Rather, it required that the United States must "prove that there is a 'substantial' possibility that the lands in question are 'trust or restricted Indian lands' " and remanded for a determination of that issue *on the merits*:

> Because the district court did not address this issue, we reverse and remand for resolution of this issue *on the merits*. On the record before us, and without the benefit of findings or briefing on these issues, we can only determine that there may or may not be a substantial possibility that the Spaeth's lands are trust or restricted lands.

Spaeth v. U.S. Secretary of the Interior (8th Cir. 1985) 757 F.2d 937, 943 (emphasis added); *accord, U.S. v. Phillips* (D. Neb. 1973) 362 F.Supp. 462. This is essentially the same approach that this Court permitted for years before 1976 to determine whether an action against a federal official was barred by sovereign immunity before the 1976 amendment to the APA. *See e.g., Malone v. Bowdoin* (1962) 369 U.S. 643, 647-48; Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action; Some Conclusions from the Public Lands Cases* (1970) 68 Mich. L. Rev. 867 (analyzing this Court's historic reluctance to recognize the sovereign immunity defense in public lands cases); *cf. Borax Consolidated, Ltd. v. City of Los Angeles* (1935) 296 U.S. 10, *reh'g denied* 296 U.S. 664 (review of public land survey); *Ritter v. Morton* (9th Cir. 1975) 513 F.2d 942, 946, *cert. denied* (1975) 423 U.S. 947 (recognizing that "in title dispute cases the issue of sovereign immunity and the ultimate merits of a plaintiff's claim are intimately interconnected"). Petitioners believe it essential that this Court require such an approach in order to prevent the United States from creating a massive loophole in the QTA by unilateral, *ex parte* boundary or other determinations purporting to redesignate public lands as Indian trust lands.[14]

In the absence of a procedure like that employed by the Eighth Circuit, the potential for mischief, particularly in the West, is enormous. The United States owns 755 million

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[14] Although the District Court did not address the merits of the Secretary's Fort Mojave boundary order in the present case, it did find it invalid as in excess of his statutory authority under 43 U.S.C. §772 and because of constitutional due process infirmities, thus meeting both *Malone* criteria.

acres of land, concentrated predominantly in the eleven Western States and Alaska where its lands comprise from 29 to 95 percent of all land in those states.[15] Interspersed throughout those extensive federal landholdings (as well as state and privately owned lands based on public land patents) are some 44 million acres of Indian trust lands, most of which are located in formal reservations.[16] The original public land surveys were notoriously "rough", and the Secretary has long been authorized to conduct resurveys to properly delimit the public lands. *See, e.g.*, Act of March 3, 1909, 43 U.S.C. §772. If such resurveys result in lands formerly thought to be public lands being reclassified as Indian lands, property owners whose rights accrued on the basis of the original survey will be unable to challenge that redetermination, thus emasculating the careful protection afforded "bona fide claimants" under the proviso to the Secretary's resurvey authority under 43 U.S.C. §772. This outrageous result necessarily flows from the Ninth Circuit's earlier decision that the exclusive method for such claimants to enforce the rights guaranteed by that proviso is under the QTA,[17] coupled with its present decision that no affirmative relief at all is available under the QTA if the United States simply alleges that the reclassified lands are "Indian trust lands." It defies common sense to believe that Congress intended such a result from enactment of a statute designed to *remove* the bar of sovereign immunity from title disputes with the United States. Properly construed, as the Eighth Circuit has done, the QTA does not produce that bizarre result.

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[15] See *One Third of the Nation's Land*, The Report of the Public Land Law Review Commission, Ch. 1 (1970).

[16] U.S. Dep't of the Interior, Bureau of Indian Affairs, *Annual Report of Indian Lands* (September 30, 1984) at 2-3.

[17] *See supra* note 13 and accompanying text. Such property claimants traditionally were able to assert their rights in a direct action against the Secretary. *See, e.g., Cragin v. Powell* (1888) 128 U.S. 691.

IV. The Ninth Circuit's decision frustrates the Congressional purpose embodied in the McCarran Amendment and 5 U.S.C. § 702 to permit orderly Indian water rights adjudications in the Western States.

In enacting the QTA Congress preserved existing law waiving sovereign immunity in the highly controversial field of western water rights adjudication. Thus section 1(a) (28 U.S.C. §2409a(a)) provides that the Act applies only to title disputes over "real property in which the United States claims an interest, other than a security interest or water rights" and that it does not "apply to or affect actions which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. 666)", the 1952 waiver of sovereign immunity with respect to water rights adjudications involving the United States (the McCarran Amendment) which this Court has held encompasses suits involving Indian water rights. *Colorado River Water Conservation District v. U.S.* (1976) 424 U.S. 800; *Arizona v. San Carlos Apache Tribe* (1983) 463 U.S. 545. The quoted language was proposed in a draft bill authored by the Justice Department, which explained that it "does not apply to civil actions . . . involving or relating to water rights." H.R. Rep. No. 1559, 92d Cong. 2d Sess. 10 (1972). The District Court suit below is clearly such an action inasmuch as the determination of an Indian reservation boundary is the essential first step in the adjudication of the "practicably irrigable acreage" within an Indian reservation which is entitled to a *Winters* right. In essence it seeks *partial* adjudication of the water rights of the three reservations—the boundary portions—and is plainly ancillary to the already completed comprehensive adjudication of all water rights along the Lower Colorado River decreed in *Arizona I*, which the Court of Appeals properly noted may satisfy the McCarran Act streamwide adjudication standard. App. at 11a.

The Ninth Circuit decision, if allowed to stand, will produce a highly deleterious impact on the already contro-

versial area of Indian water rights adjudications in the West. At the time of enactment of the QTA, a water right claimant desiring to contest a *Winters* right claim for an Indian reservation could either wait to participate in a streamwide adjudication (if one were initiated) or else bring an officer's suit to attempt to circumvent the sovereign immunity defense. In the general adjudication proceeding the United States would have to establish all of the elements of its *Winters* claim. If its irrigable acreage claim was challenged because of a boundary dispute, the boundary would be tried and adjudicated. If a general stream adjudication was not underway, the water rights claimant could attempt to litigate the validity of the disputed boundary in accordance with the criteria set forth in *Malone v. Bowdoin* (1962) 369 U.S. 643. The amendment of the APA in 1976 waiving the doctrine of sovereign immunity in review of agency actions was intended to eliminate the need for the officer's suit fiction. Indeed the Ninth Circuit has already held that the APA waiver permits suits against federal officials with respect to actions affecting water rights because the McCarran Amendment is not the exclusive remedy for water claims, as the QTA is for quiet title actions. *South Delta Water Agency v. U.S.* (9th Cir. 1985) 767 F.2d 531; *accord, Joint Board of Control of the Flathead, Mission and Jocko Irrigation Dists v. U.S.*; (9th Cir. 1987) 832 F.2d 1127. Despite these holdings, the Ninth Circuit decision below holds, inconsistently, that a suit challenging Indian boundary determinations *solely* to determine water rights and not to divest the United States of title to land is barred. Consequently, the Secretary is free to make *ex parte* boundary determinations and divert water for any added acreage with impunity until a streamwide adjudication is initiated and completed.

Thus, under the Ninth Circuit's decision, the ironic result of (1) Congress' commendable attempt in the QTA of 1972 to preserve existing law waiving sovereign immunity in water rights disputes and (2) Congress' broad waiver

of the sovereign immunity defense in the 1976 APA amendments has been to *narrow* water claimants' access to the courts where the magnitude of an implied *Winters* right turns on a disputed reservation boundary. The absurdity of this retrogressive result demonstrates the basic fallacy of the Ninth Circuit's decision, and this Court should remedy the confusion and inequity which the decision will cause in Indian water rights adjudications in the West.

CONCLUSION

In order to permit the long overdue resolution of the three Indian water rights claims injected by the United States in *Arizona I* almost 35 years ago so that public agencies in California and Arizona may carry out essential water supply planning on the lower Colorado River, petitioners respectfully request that their petition for a writ of certiorari be granted and the Ninth Circuit's decision be summarily reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit

Nos. 86-6332, 86-6741

Argued and Submitted July 7, 1987

Decided Oct. 14, 1987

The METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California, and the Coachella Valley Water District, a public agency of the State of California,

Plaintiffs-Appellees,

v.

The UNITED STATES of America; Donald P. Hodel, Secretary, U.S. Department of Interior,

Defendants-Appellants,

and

QUECHAN INDIAN TRIBE; Fort Mojave Indian Tribe, and Colorado River Indian Tribes,

Defendants-Intervenors-Appellants,

v.

STATE OF CALIFORNIA and State of Arizona,

Defendants-Appellees.

Water district holding water rights inferior to those of Indian tribes brought action against United States to challenge orders by Secretary of Interior resurveying boundaries of Indian reservation. The United States District Court for the Southern District of California, 628 F.Supp. 1018, Rudi M. Brewster, J., held in favor of districts. The United States and Indian tribes brought interlocutory appeal. The Court of Appeals held that: (1) United States

did not waive sovereign immunity from suit; (2) Quiet Title Act gave United States immunity from suit; and (3) McCarran amendment did not authorize private suits to decide priorities between United States and particular claimants on stream.

Remanded.

Dale T. White (argued), Fredericks & Pelcyger, Boulder, Colo., for Fort Mojave Indian Tribe.

William Strickland, Strickland & Altaffer, Tucson, Ariz., for Quechan Tribe.

Scott B. McElroy, Melody L. McCoy, Native American Rights Fund, Boulder, Colo., William G. Lavell, Pamela S. Williams, Colorado River Indian Tribe, Parker, Ariz., for Colorado River Indian Tribes.

Warren J. Abbott, Karen Tachiki, James F. Roberts, Metropolitan Water Dist. Los Angeles, Cal., Jerome C. Muys (argued), Washington, D.C., for Metropolitan Water Dist.

Sarah P. Robinson (argued), F. Patrick Barry, Land & Natural Resources Div., Washington, D.C., for U.S.

Anthony Ching, Sol. Gen., State of Ariz., Phoenix, Ariz., for State of Ariz.

Justin McCarthy, Redwine & Sherrill, Riverside, Cal., for Coachella Valley Water Dist.

Douglas Noble, Anthony M. Summers, Kenneth R. Williams, Deputy Atty. Gens., Office of the Atty. Gen., Los Angeles, Cal., for State of Cal.

Appeal from the United States District Court for the Southern District of California.

Before BROWNING, Chief Judge, FLETCHER and POOLE, Circuit Judges.

PER CURIAM:

Appellants, the United States and the intervenors, Indian Tribes,[1] bring this interlocutory appeal to challenge the district court's holding (1) that the Secretary of the Interior lacks authority to resurvey the boundary between the Fort Mojave Reservation and other public land; and (2) that, the district court has authority and intends to conduct a trial *de novo* to determine the boundaries of the Reservation.[2] We remand to the district court with direction to dismiss for lack of jurisdiction.

FACTS

The Secretary of the Interior determined that the original survey of the Fort Mojave Reservation was incorrect and that the Reservation's corrected boundaries contained 3500 more acres than the old boundaries. The challenge is to the Secretary's order establishing the new boundary, but the actual dispute between the parties is over the Tribe's claim that it is entitled to an increase of water rights in the Colorado River because of the increase in the Reservation's acreage.

Appellees, the Metropolitan Water District of Southern California (MWD), and the Coachella Valley Water District are California public corporations engaged in the development, storage, and delivery of water to their member public agencies for municipal and domestic use. We refer only to MWD but the references are applicable equally to the Coachella Valley Water District. A major portion of MWD's water supply is obtained under contracts with the Secretary of the Interior for Colorado River water. Under

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[1] Quechan Indian Tribe, Fort Mojave Indian Tribe, and Colorado River Indian Tribes.

[2] The district court has not ruled as yet on boundary orders affecting the Colorado River and Fort Yuma reservations. The issues are the same as those presented by the ruling on the Fort Mojave reservation boundary order. The three tribes have sought the interlocutory appeal and join in one brief.

the contracts, MWD's entitlement to water is subject to the satisfaction of entitlements belonging to entities, such as the Fort Mojave Indian Tribe (Tribe), that hold higher priorities.

In *Arizona v. California,* 373 U.S. 546, 600, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963) (*Arizona I*) the Supreme Court established priorities of users of Colorado River water. It held that the Tribe's priority dates from the time of the creation of its reservation and based the amount of its entitlement on the "practicably irrigable acreage" in its reservation. *Id.* at 600-601, 83 S.Ct. at 1498. Contract purchasers such as MWD have lower priorities.

In *Arizona I,* although the Special Master had heard evidence and made recommendations as to the correct boundary for the Reservation, the court reserved the issue for later determination. The dispute as to where the boundary lies arises from inconsistencies in the 1870 legal description of the Hay and Wood Reserve, a portion of the Reservation. The Court allocated to the Tribe the quantity of water necessary to irrigate the practicably irrigable acreage of the reservation as calculated by the Special Master based on the old boundaries. However, the Court provided that: "[T]he quantities fixed . . . shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations [including the Fort Mojave Indian Reservation] are finally determined." *Arizona v. California,* 376 U.S. 340, 345, 84 S.Ct. 755, 758, 11 L.Ed.2d 757 (1964) (Court Decree). The Court retained jurisdiction for the purpose of further modifications and orders that it might deem proper. In 1979 the Court entered a supplemental decree identifying the then perfected rights to the use of the mainstream water in each state and their priority dates as agreed by the parties. *Arizona v. California,* 439 U.S. 419, 99 S.Ct. 995, 58 L.Ed.2d 627 (1979) (Supplemental Decree). Before the Supplemental Decree was entered, new

questions arose. Consequently, the Court appointed Judge Elbert Tuttle to conduct hearings on the various motions.

In June 1974, the Secretary of the Interior, pursuant to a resurvey he had ordered, determined that the original survey of the Fort Mojave Reservation was incorrect and readjusted the Reservation boundaries to enclose 3500 additional acres. Judge Tuttle, as Special Master, after hearing found that this was a final determination. Based on the Special Master's finding, the United States applied to the Supreme Court for a reallocation of water rights to increase the Tribe's share. *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) (*Arizona II*). Recognizing that the Special Master's finding threatened to diminish its water allocations from the Colorado River, MWD filed this action in the district court for the Southern District of California challenging the Secretary's order. The district court initially stayed this case pending the Supreme Court's decision in *Arizona II.*

In *Arizona II* the Court, finding that the Secretary's determination of the Reservation boundary was not a final determination, apparently because it was made *ex parte* by the Secretary, *id.* at 636, 103 S.Ct. at 1400, declined to decide the case, suggesting that the dispute possibly could be decided in another forum. It specifically referred to this case then pending in the district court as a potential vehicle, stating: "At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes." *Id.* at 638, 103 S.Ct. at 1401. The Court, however, recognized that there might be obstacles to the district court litigation:

> We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limi-

> tations. There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

Id.

After the Court's decision in *Arizona II,* the district court lifted its stay in this case. It found that it had jurisdiction, and that the Secretary had exceeded his statutory authority and had not complied with due process in ordering the resurvey. The district court decided it would hold a trial *de novo* to determine the correct boundary. *Metropolitan Water District v. United States,* 628 F.Supp. 1018, 1025 (S.D.Cal. 1986). We granted the Tribe's motion for interlocutory review pursuant to 28 U.S.C. § 1292(b).

JURISDICTION[3]

The Government and the Tribe assert that the quiet Title Act, 28 U.S.C. § 2409a[4] governs this action and, that

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[3] Although not directly raised by the parties, this case presents the additional jurisdictional problem of absence of a case or controversy. MWD filed this action after Special Master Tuttle found that the Secretary's order adding 3500 acres to the Mojave Reservation was a final determination. The tribe then applied to the Supreme Court to have water rights reallocated on the basis of the master's decision (*Arizona II*). At that juncture, a case or controversy seems to have existed since the Secretary's determination had been declared final by the Special Master and was the basis for the Special Master's reallocation of water rights to the disadvantage of plaintiff. The Supreme Court, however, held that the Secretary's action was not a final determination. As long as the order is not final, MWD's water rights are not threatened because those rights cannot be reallocated until there is a final order. The Court's decision in *Arizona II* suggests that before the Secretary's finding that the Reservation included 3500 acres could be deemed final, the Secretary would have to provide "due process" to parties adversely affected and the Secretary's order would have to be judicially reviewed. There is a substantial question, therefore, whether a suit initiated by MWD at this time presents a case or controversy. However, since we conclude the district court was without jurisdiction on other grounds, we do not decide this question.

by its terms, the United States is immune from suit. MWD responds that the Government has waived its claim of sovereign immunity because it did not raise it before the district court and because it has litigated in *Arizona I* and *II.* Additionally, MWD claims that the Quiet Title Act does not apply to this action in any event, and asserts that the district court has jurisdiction under the Administrative Procedure Act and the *McCarran Amendment.*

A. *Waiver*

The United States does not waive sovereign immunity by implication; any waiver must be unequivocally expressed. *Chemehuevi Indian Tribe v. California State Bd. of Equalization,* 757 F.2d 1047, 1052-53 (9th Cir.) *rev'd on other grounds, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985).* Waivers of sovereign immunity are construed strictly and narrowly. *Block v. North Dakota,* 461 U.S. 273, 287, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983). For example, merely by instituting a suit, the United States does not consent to be sued on a counterclaim based on a cause of action for which it has not otherwise given its consent to be sued. *See Chemehuevi,* 757 F.2d at 1053; *United States v. Drinkwater,* 434 F.Supp. 457, 460 (E.D.Va.1977).

MWD suggests that by participating in the *Arizona I* and *II* litigation to obtain water rights for the Tribe, the United States has waived its sovereign immunity to any

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[4] 28 U.S.C. § 2409a(a) provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands. . . .

ancillary proceeding that might affect those rights.[5] It claims that the United States is litigating in the district court the identical claim it presented and litigated (unsuccessfully) before the Supreme court. In *Arizona II,* at issue, however, was the allocation of water rights. Although the Court declined the reallocation and found that the Secretary's boundary determination was not a final determination that could serve as a basis for the allocation of additional water rights, it did not void the Secretary's action in ordering the resurvey. The authority of the Secretary to issue such orders was not litigated. An application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent by the Secretary to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries.[6]

B. *Quiet Title Act*

MWD brought suit under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (APA). Section 702 of the APA

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[5] MWD claims also that the United States' lawyer made admissions in the Supreme Court in *Arizona II* that constitute a waiver of immunity that bind the United States. The lawyer remarked that "I hope I do not have to—I disown the motion to dismiss which has been filed by the United States in the district court. . . ." MWD also asserts as evidence of waiver a statement in the United States' amended answer in this case that "[w]here the action merely questions the accuracy of the determination of reservation boundaries, and the legal title to the lands is not at issue, we think the action may go forward pursuant to the Administrative Procedure Act." Because this suit involves more than just the accuracy of the Secretarial determinations, and does put at issue legal title in the sense that it seeks to deprive the Tribe of title, we do not interpret the above statements as a waiver of immunity.

[6] We note that at such time as the Secretary seeks the allocation of water rights based on altered boundaries that adversely affect MWD, the Government should not be able to claim sovereign immunity to avoid challenge to the propriety of the water allocation. *See United States v. Martin,* 267 F.2d 764, 769 (10th Cir. 1959).

waives sovereign immunity for suits against federal officers in which the plaintiff seeks nonmonetary relief. The APA, however, does not waive immunity as to any claims which are expressly or impliedly forbidden by "any other statute that grants consent to suit." The Quiet Title Act (QTA), 28 U.S.C. § 2409a is such an act. *Block v. North Dakota,* 461 U.S. at 286, n. 22, 103 S.Ct. at 1819 n. 22. The QTA permits the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land. However, when the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands, the Government is immune from suit under the QTA. *See United States v. Mottaz,* 476 U.S. 834, 106 S.Ct. 2224, 2229-30, 90 L.Ed.2d 841 (1986); *Wildman v. United States,* 827 F.2d 1306, 1309 (9th Cir. 1987).

MWD asserts that the QTA does not apply here because it is not seeking to quiet title in itself. It claims rather that its objective is to prevent the Tribes from gaining an earlier water priority because of the additional land the survey includes in the Reservation. Although MWD may not be seeking to quiet title to the land in itself, it seeks a determination of the boundaries of the Reservation. The effect of a successful challenge would be to quiet title in others than the Tribe.

Congress, in passing the Indian lands exception to the QTA, explained that

> [t]he Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic re-

lationship between the Federal Government and the Indians without the consent of the Indians.

H.R.Rep. No. 1559, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4547, 4556-67. To allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them. *See Florida Dept. of Business Regulation v. United States Dept. of Interior,* 768 F.2d 1248, 1253-55 (11th Cir. 1985), *cert. denied,* ___U.S. ___, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). MWD challenges the fundamental authority of the Secretary to establish reservation boundaries and to protect the property interests of Indian tribes. This it cannot do.

C. *Trust or Restricted Indian Lands*

MWD relies on *Spaeth v. United States Secretary of Interior,* 757 F.2d 937 (8th Cir. 1985) to argue that even if the QTA is applicable here, that the United States has not made the requisite showing that the lands at issue are "trust or restricted Indian land." The court in *Spaeth,* in considering the claim that the United States was immune under the Indian lands exception to the QTA, found that title problems, not clarified in the record below, made it impossible to determine whether parts of the land in question were "trust or restricted Indian lands." Accordingly, the court remanded the case to the district court to resolve the title dispute and to determine whether the United States had a substantial claim to the land. MWD's reliance on *Spaeth* is misplaced. The Secretary of the Interior has found the land in this case to be Indian lands; nothing in the record suggests that plaintiffs have superior title or, in fact, any title.

This circuit's recent *Wildman* case puts at rest any possible argument that MWD might assert in this regard. "Nothing in the statute [QTA] or its history suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the Government declares that it is the trustee for Indians." *Id.,* at 1309. The *Wildman* court goes on to state that "[s]overeign immunity, therefore, prevents the district court from exercising jurisdiction. The immunity of the government applies whether the government is right or wrong." *Id.* at 1309.

D. *McCarran Amendment*

Finally, MWD asserts that if the QTA applies, the McCarran Amendment nonetheless permits suit here. The McCarran Amendment, 43 U.S.C. § 666 provides that the United States is deemed to have waived its immunity in any suit for the adjudication of rights to the use of water of a river system or other source, or for the administration of such rights. The McCarran Amendment, however, does not authorize private suits to decide priorities between the United States and particular claimants, only suits to adjudicate the rights of all claimants on a stream. *Dugan v. Rank,* 372 U.S. 609, 617-18, 83 S.Ct. 999, 1004-05, 10 L.Ed.2d 15 (1963). This suit is not such a general adjudication.[7]

CONCLUSION

We remand to the district court with direction to dismiss for lack of jurisdiction.

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[7] The ongoing litigation, however, in the Supreme Court under the continuing decree may be such a general adjudication.

APPENDIX B

United States District Court,
S.D. California.

Civ. No. 81-0678-B.

Feb. 25, 1986.

The METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the Coachella Valley Water district, a public agency of the State of California,

Plaintiffs,

v.

The UNITED STATES of America, James Watt, Secretary, United States Department of the Interior, State of Arizona, State of California,

Defendants,

Quechan Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe,

Intervenors.

Party holding water rights inferior to those of Indian tribes brought action against United States requesting that certain orders by the Secretary of the Interior purporting to finally determine boundaries of Indian reservations be voided. On cross-motions for summary judgment, the district Court, Brewster, J., held that: (1) Indian reservation resurvey statute prohibiting Secretary of Interior from executing a resurvey in a way that would impair bona fide rights of any claimant affected by such a resurvey, not just the rights of owners of the land, would not permit a resurvey, or consequent relocation of boundaries of reservation, that would affect party holding water rights which would be affected by possible changes in allocations to Indian tribes holding superior water rights; (2) Secretary's *ex parte* review did not comport with due process to which holder of water rights was entitled; but (3) substantial fact issue existed as to boundaries and acreage intended by United States when it established Indian reservation, precluding summary judgment in favor of United States on issue of boundaries of reservation.

Judgment accordingly.

Warren J. Abbott, Karen L. Tachiki, James F. Roberts, Los Angeles, Cal., for plaintiff Metropolitan Water Dist.

F. Patrick Barry, U.S. Dept. of Justice, Washington, D.C., for defendants U.S. and James Watt.

Dale T. White, Fredericks & Pelcyger, Boulder, Colo., for intervenor Fort Mojave Tribe.

Douglas Noble, Deputy Atty. Gen., Los Angeles, Cal., for defendant State of Cal.

Scott B. McElroy, Native American Rights Fund, Boulder, Colo., for intervenor Colorado River Indian Tribes.

William Strickland, Strickland & Altaffer, Tucson, Ariz., for intervenor Quechan Indian Tribe.

OPINION AND ORDER

BREWSTER, District Judge.

I. BACKGROUND

This litigation arises out of disputes concerning the boundaries of the Fort Yuma Indian Reservation, the Colorado River Indian Reservation, and the fort Mojave Indian Reservation. Determination of the boundaries will affect the relative allocations of Colorado River water to the three intervenor Indian tribes and to other users in the States of California and Arizona, including plaintiffs herein. Pursuant to stipulation of the parties, the Court

presently is concerned only with the boundaries of the Hay and Wood Reserve of the Fort Mojave Reservation (hereinafter "the Reserve").

The Reserve portion of the Fort Mojave Reservation was initially surveyed by Lieutenant George Wheeler in 1869 as an addition to the Camp Mojave military fort.[1] The legal description of the Reserve was prepared and adopted by Executive Order in 1870. By an 1890 Executive Order, Camp Mojave and the Hay and Wood Reserve were transferred to the Department of Interior to be held in trust as a reservation for the Fort Mojave Tribe (hereinafter "FMT"). The 1890 Executive Order adopted the 1870 legal description of the Reserve.

After the transfer of these military lands to the Fort Mojave Tribe, a contradiction in the 1870 legal description was discovered. The courses and distances set forth in the description delineate an area containing 9,114.81 acres, although the description places the post marking the western boundary of the Reserve on the left, or east, bank of the Colorado River. Subsequent surveys have shown that if the posts were located on the east bank of the river as it flowed in 1870, the Reserve would contain approximately 5,600 acres, some 3,500 acres less than the acreage contained in the 1870 legal description. To contain 9,114 acres, the western corners would have to be located on the foothills approximately one and one-half miles west of the Colorado River.

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[1] Lieutenant Wheeler was acting under Special Orders No. 222 dated December 15, 1868, which ordered him, *inter alia,* as follows:

> The amount, location, and boundaries of these reservations will be determined by the Post Commander, after consultation with Lieutenant wheeler, the amount of land not to exceed three miles square for the station, and not to exceed the same additional amount for all other purposes. . . .

The court takes judicial notice of the fact that three miles square, or nine square miles, comprises approximately 5,760 acres.

Plaintiff Metropolitan Water district of Southern California (hereinafter "MWD") is a California public corporation engaged in the development, storage, and delivery of water to its member public agencies for municipal and domestic use. A major portion of MWD's water supply is obtained pursuant to 1930 and 1931 "permanent service" contracts with the Secretary of Interior for the receipt of Colorado River water. The contracts were made in accordance with section five of the Boulder Canyon Project Act of 1928, 43 U.S.C. § 617(d). Under the contracts, MWD's entitlement to Colorado River water is subject to satisfaction of the entitlements of those holding higher priorities. The contracts give MWD fourth and fifth priority rights, respectively, to the receipt of 550,000 and 662,000 acre feet of water annually.

In *Arizona v. California,* 373 U.S. 546, 600, 83 S.Ct. 1468, 1497-98, 10 L.Ed.2d 542 (1963), the Supreme Court held that the Indian reservations, including the Fort Mojave reservation, had rights to Colorado River water effective as of the time of the creation of the reservations. Thus, MWD's water entitlement is subordinate to the rights of FMT. Because the Colorado River and fort Yuma reservations were also created before MWD contracted for the receipt of Colorado River water, MWD's entitlement is also subordinate to the water rights of those reservations. The Supreme Court also held in its 1963 decision that a tribe's entitlement is based on the "practicably irrigable acreage" on its reservation. *Id.* at 600-01. Thus, it is obvious that the water rights of MWD are affected by the determination of the practicably irrigable acres on the three reservations.

In the proceedings leading to the Supreme Court's 1963 decision in *Arizona v. California,* Special Master Simon Rifkind, appointed by the Supreme Court, took testimony concerning the disputed boundaries of the Reserve. Special master Rifkind's recommendations to the Supreme Court generally found in favor of the California parties and con-

trary to the larger boundary area advocated by FMT and the United States. However, the Supreme court concluded that there was no necessity to make a boundary determination at that time. *Id.* at 601, 83 S.Ct. at 1498. Article II(D)(5) of the Court's 1964 Decree nevertheless fixed FMT's allocation of Colorado River water according to the recommendations of the Special Master, but provided that "the quantities fixed in this paragraph . . . shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. . . ." *Arizona v. California,* 376 U.S. 340, 345, 84 S.Ct. 755, 758, 11 L.Ed.2d 757 (1964).

On June 3, 1974, the Secretary of Interior ordered the Reserve to be resurveyed to include 9,114.81 acres, the larger boundary area advocated by FMT and the United States before Special Master Rifkind in 1963 (hereinafter the June 1974 order). The June 1974 order had the effect of adding approximately 3,500 acres to the area of the Reserve beyond the area established by the last Department of Interior survey in 1928. The Secretary rejected the portion of the 1870 legal description of the Reserve that marked the western boundary by reference to posts located near the left (east) bank of the Colorado River. He ordered that the western boundary be reestablished to conform to the acreage description of 9,114.81 acres. The June 1974 order was based upon an in-house investigation conducted by the Department of Interior's legal staff. MWD was not afforded the opportunity to participate, either by way of comment or hearing, in the investigation.

In 1978, the United States and FMT moved the Supreme Court to increase the tribe's water allocation based on the Secretary's June 1974 order. Special Master Elbert Tuttle agreed with the United States and FMT that the Secretary of the Interior had "finally determined" the reservation's boundaries within the meaning of Article II(D)(5) of the Court's 1964 Decree. He recommended that the Court

award FMT increased water rights commensurate with the increased practicably irrigable acreage.

The Supreme Court rejected this recommendation, stating:

> In our 1963 opinion, when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights.

Arizona v. California, 460 U.S. 605, 636, 103 S.Ct. 1382, 1400, 75 L.Ed.2d 318 (1983). The Court added, however, "we now intimate nothing as to the Secretary's power or authority to take the actions that he did or as to the soundness of his determinations on the merits". *Id.* at 637, 103 S.Ct. at 1400-01. The Court then made reference to the instant litigation, which had been instituted by MWD and the Coachella Valley Water district in July 1981 as follows:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary dispute would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes.

Id. at 638, 103 S.Ct. at 1401.

In this action, plaintiffs request this court to void the June 1974 order and other orders by the Secretary of Interior purporting to finally determine the boundaries of

the Fort Yuma, Fort Mojave, and Colorado River reservations. The plaintiffs also seek a declaration of the location of the boundaries different from those fixed by the Secretary's orders. Since the tribes' water rights have priority over plaintiffs' rights, any increases in the tribal allocations will diminish the quantity of water MWD may divert in any year in which the State of California is restricted to 4.4 million acre-feet of water or less.

Before the court now, therefore, are the following motions: (1) defendant the United states seeks summary judgment affirming the June 1974 Interior Department order; (2) plaintiff MWD brings a cross motion for summary judgment, asking the court to find the June 1974 order void and to declare that the western boundary of the Reserve is the left (east) bank of the Colorado river in its last natural course—defendant California has submitted a statement in support of MWD's summary judgment motion; (3) intervenor FMT seeks partial summary judgment affirming the June 1974 order; and (4) the United states and FMT move to strike certain documents and affidavits submitted by MWD and California as outside the administrative record.

II. SCOPE OF REVIEW

The first issue presented by these motions is the scope of review of the Secretary's June 1974 order.[2] This requires the court initially to determine whether there was statutory authority for the Secretary's action.

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[2] The court does not interpret the Supreme Court's holding in the 1983 *Arizona v. California* decision, that the June 1974 order was not a "final determination" within the meaning of the 1964 Decree, to require this court to make a *de novo* determination. Instead, the court reads the Supreme Court's *caveat* that "we . . . intimate nothing as to the Secretary's power or authority to take the actions that he did", 460 U.S. at 637, 103 S.Ct. at 1400, to allow this court independently to determine whether the Secretary had authority to issue his June 1974 order.

A. *Secretary's Authority to Issue the June 1974 Order.*

The Secretary of Interior asserts authority to order the resurvey of the Hay and Wood Reserve under 43 U.S.C. § 772. that statute provides:

> The Secretary of the Interior may, in his discretion, cause to be made, as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided,* That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement. (emphasis in original)

MWD contends that the proviso to this section deprived the Secretary of authority to order the resurvey of the Reserve, since MWD is a "claimant" whose contractual right to the allocation of Colorado River water is adversely affected by the addition of more practicably irrigable acreage to the Reserve. The United States and FMT argue that the proviso-only protects rights to the possession of land within the area to be resurveyed.

The language of the proviso suggests it was meant to have a broad sweep. It prohibits the Secretary from executing a resurvey in a way that would impair the bona fide rights of *any claimant* affected by such resurvey, not just the rights of owners of land. The words "any claimant" indicate to the court that Congress intended to protect the entire spectrum of rights of claimants that might be affected by a land resurvey. The court holds that spectrum of rights to include water rights that are affected by the acreage of lands to be resurveyed.[3]

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[3] The sparse legislative history on the proviso sheds little, if any, light on its interpretation.

Furthermore, as discussed below, accepting the interpretation advocated by the United States and FMT would raise a serious question whether section 772, as applied to this situation, comports with due process. The statute vests the Secretary with broad discretion to order resurveys, without requiring that potentially aggrieved parties be allowed to participate in the decision-making process.[4] Ambiguous statutes should, if possible, be construed to avoid a constitutional question. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power Light Co.,* 459 U.S. 400, 410 n. 10, 103 S.Ct. 697 703 n. 10, 74 L.Ed.2d 569 (1983). Thus, this court reads the word claimant broadly to avoid interpreting section 772 to allow the Secretary to affect property interests without providing due process to affected interests.

The court concludes that, by virtue of the fact that MWD's water rights are affected by changes in the allocations to tribes holding superior water rights, MWD is a claimant to water rights in the Colorado River and is affected by the June 1974 order to resurvey the Reserve. The Secretary thus lacked authority to issue the June 1974 order, and the order must be set aside pursuant to 5 U.S.C. § 706(2)(C) (reviewing court shall set aside agency action found to be in excess of statutory authority). Since the Secretary lacks authority to relocate the instant boundaries, this court must make a *de novo* determination of the proper location of the boundary.

B. *Procedural Due Process.*

Even if the Secretary possessed authority under section 772 to issue the June 1974 order, the court is also charged by 5 U.S.C. § 706(2)(D) to set aside agency action taken without observance of the procedures required by law, in-

[4] This court concludes below that MWD's water rights are property interests protected by the due process clause.

cluding the requirements of the due process clause of the fifth amendment.[5]

The first step in a procedural due process analysis is to determine whether a liberty or property interest is at stake.[6] *Board of Regents v. Roth,* 408 U.S. 564, 570-71, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548 (1972).

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim or entitlement to it.

Id. at 577, 92 S.Ct. at 2709. MWD contends that its 1930 contract and its 1931 supplemental contract with the Secretary of Interior for the receipt of Colorado River

[5] 5 U.S.C. § 706 provides in relevant part as follows:

> The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (D) without observance of procedure required by law.

[6] The United States and FMT raise a threshold argument that the Metropolitan Water district, as a public entity created by the State of California, is not a "person" protected by the fifth amendment. Although the Supreme Court has stated, without explanatory analysis, that the "States of the Union" cannot be considered "persons" under the fifth amendment, *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24, 86 S.Ct. 803, 815-16, 15 L.Ed.2d 769 (1966), it is doubtful that this conclusion applies to state-created public corporations such as MWD. It is well established that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law. *Covington and Lexington Turnpike Road Co. v. Sandford,* 164 U.S. 578, 592, 17 S.Ct. 198, 203, 41 L.Ed. 560 (1896); *See First National Bank of Boston v. Bellotti,* 435 U.S. 765, 780 n. 15, 98 S.Ct. 1407, 1418 n. 15, 55 L.Ed.2d 707 (1978). The court concludes that MWD is protected by the due process clause.

water in perpetuity created a property interest for due process purposes.

FMT argues that the contracts do not create a property interest because they recite that the United States is not obligated to deliver water when delivery would interfere with the entitlement of those with priority rights, such as FMT. Assuming FMT's interpretation of the contracts is correct, the contracts nevertheless cannot be reasonably interpreted to vest the Secretary of Interior with unilateral authority to enlarge the allocations to those with priority rights. The contracts do not put MWD on notice that, by *ex parte* application of priority users, the United States could permanently diminish the value of MWD's contractual allocation.

The 1930 contract, as supplemented by the 1931 contract, provides that MWD has a fourth priority right to the receipt of 550,000 acre feet of water annually and a fifth priority right to 662,000 acre feet annually. The amounts of water to be diverted to the holders of higher contractual priorities are also set forth in the contracts. The 1930 contract states that it is for "permanent service". The court must conclude that the contracts vest MWD with a legitimate claim of entitlement to the receipt of Colorado River water according to the priorities listed on these contracts, and that this claim is a property right cognizable by the fifth amendment.

The conclusion that MWD has a property interest in its contractual allocation is supported by language from the Supreme Court's 1983 *Arizona v. California* decision. Responding to the dissent's contention that the tribes should be awarded an immediate increase in their water rights based on the *ex parte* secretarial orders, the majority noted that "[t]he dissent's reasoning would also deprive the States, albeit on a 'conditional basis,' . . . of valuable water rights now vested in them, without affording them the slightest semblance of a fair hearing on their claims. *Cf.*

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (invalidating a procedure allowing prejudgment taking of property without notice or hearing)." 460 U.S. 605, 639 n. 28, 103 S.Ct. 1382, 1401 n. 28, 75 L.Ed.2d 318 (1983). Implicit in this statement and the citation of *Fuentes* is the conclusion that the states had a property interest in the receipt of Colorado River water. If so, then so also does MWD, by virtue of its 1930 and 1931 contracts.

The second step in the procedural due process inquiry is to determine whether the Secretary's procedures comported with due process. Due process requires, at a minimum, notice and an opportunity to be heard. *Gross v. Lopez,* 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). MWD did not receive notice of the investigation preceding the June 1974 order, nor was it afforded an opportunity to express its views either in writing or by way of evidentiary hearing at any point in the decision-making process. The Secretary's *ex parte* review fell far short of the procedures required by due process. Pursuant to 5 U.S.C. § 706(2)(D), the court, therefore, voids the June 1974 order.

Under this alternative ground for invalidating the June 1974 order, the court is authorized to make a *de novo* determination of the boundaries of the Reserve. In *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971), the Supreme Court held that "*de novo* review is authorized when the action is adjudicatory in nature, and the agency fact-finding procedures are inadequate". *See Camp v. Pitts,* 411 U.S. 138, 141-42, 93 S.Ct. 1241, 1243-44, 36 L.Ed.2d 106 (1973); *Porter v. Califano,* 592 F.2d 770, 782-84 (5th Cir. 1979) (ordering *de novo* review where agency's fact-finding held to be biased).

The *Overton Park* requirements are met in this case. First, the boundary determination was adjudicatory in na-

ture. En route to the June 1974 order, the Secretary made a factual finding regarding the intent of Lieutenant George Wheeler when he surveyed the Reserve. This finding of fact in turn was based on subsidiary factual findings regarding Wheeler's surveying methods and procedures. The Secretary's order falls in the broad category of agency action characterized as informal adjudication. *See City of West Chicago v. United States Nuclear Regulatory Commission,* 701 F.2d 632, 644 (7th Cir. 1983) and authorities cited therein. Second, the court has already found that the procedures used to resolve these factual questions were inadequate because they failed to comport with minimum standards of due process.

To summarize, the court concludes that it should make a *de novo* determination of the boundaries of the Reserve based on two alterative grounds: (1) the June 1974 order exceeded the Secretary's statutory authority; and (2) the fact-finding procedures used to adjudicate the boundary did not comport with due process. The court notes that this conclusion is buttressed by its concern for both the appearance and reality of objectivity in decision-making. The appearance of objectivity is not furthered when the Secretary of the Interior acts as the arbiter of boundary disputes whose resolution has a massive impact on rights to Colorado River water and, at the same time, serves as trustee for three of the Indian tribes which have a significant stake in the outcome. *Cf. Porter v. Califano,* 592 F.2d at 782-84. The need for the appearance of objectivity favors *de novo* determination by this court.

Having determined that *de novo* review is proper, the court finds its appropriate to consider all evidence presented by the parties, including evidence not made a part of the administrative record. Accordingly, the motions to strike by the United states and FMT should be denied.

III. THE MOTIONS

In addition to conducting a lengthy oral hearing, the court has thoroughly reviewed the evidence submitted by all parties regarding the boundaries of the Reserve, including the Administrative Record, the appendix documents submitted by MWD, and the affidavits submitted by MWD and the State of California. The court concludes that there are genuine issues of material fact in dispute.

The dispute concerning the boundaries of the Reserve arises from the contradiction in the Reserve's 1870 legal description, as discussed above. The parties are in basic agreement on the legal ground rules for resolving this contradiction. Generally, calls to monuments (such as the banks of a river) should prevail over calls to courses and distances. *See, e.g., United States v. State Investment Co.,* 264 U.S. 206, 211, 44 S.Ct. 289, 290, 68 L.Ed. 639 (1924). An exception to this rule, however, is that it should not be adhered to when to do so would defeat the intent of the grantor. *See, e.g., Bartlett Land & Lumber Co. v. Saunders,* 13 Otto 316, 103 U.S. 316, 322, 26 L.Ed. 546 (1881). Thus, the court must determine the intent of the grantor of the Reserve, if possible to ascertain.

The court finds that there is a lively dispute as to the boundaries and acreage intended by the United States when it established the Reserve. As a guide to the parties, the court notes that it is not as convinced as the parties appear to be that the boundaries actually surveyed by Lieutenant Wheeler are determinative of the intent of the grantor. In later proceedings, the parties should be prepared to address whose intent constitutes the intent of the grantor. For instance, the intent of those giving instructions to Wheeler may be more probative of the intent of the grantor than Wheeler's intent. In any event, the conflicting evidence regarding the intent of the grantor precludes summary judgment at this point. The court be-

lieves that a trial will be necessary to resolve this factual dispute.

The parties will be contacted shortly for the purpose of arranging a status conference at which a discovery schedule and a trial date will be established.

ORDER

Based on the above opinion, IT IS HEREBY ORDERED THAT:

(1) The Secretary's June 1974 order is void. To this extent, MWD's motion for summary judgment on the second claim for relief in the second amended complaint is GRANTED IN PART.

(2) In all other respects, MWD's motion for summary judgment is DENIED.

(3) The motions for summary judgment by the United States nd the Fort Mojave Tribe are DENIED.

(4) The motions of the United States and FMT to strike affidavits and appendix documents are DENIED.